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7 COMCAST CABLE COMMUNICATIONS LLC

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

10
11 In re
12 ACACIA MEDIA TECHNOLOGIES
13 CORPORATION

Case No. C-05-01114 JW
MOTION TO SET BRIEFING
SCHEDULE FOR MOTION FOR
RECONSIDERATION
(CIVIL L.R. 7-11)

Judge: Honorable James Ware

I. INTRODUCTION

Defendants¹ bring this motion to set a briefing schedule for the Motion for Reconsideration that is set for hearing on September 8 and 9, 2005. At the June 14 Case Management Conference, the Court directed the parties to meet and confer on a briefing schedule. They did so, and agreed to dates to file opening briefs, oppositions, and reply briefs; a deadline to depose experts; and other dates. After the Court issued its June 21 Order Following Case Management Conference, however, Acacia took the position that the Court wants no briefing on claim construction. In Acacia's view, because the June 21 Order sets dates for Patent Local Rule 4-1, 4-2, and 4-3 statements, but not for claim-construction briefs, the Court has effectively ordered the parties not to file any briefs at all.²

Defendants read the Order differently. Nowhere does it say that the parties should not file briefs. Instead, it sets dates for certain disclosures and submissions, but leaves the briefing schedule open since the Court had already directed the parties to confer and stipulate to a schedule. Defendants also believe that dispensing with briefing on such critical and complex issues would prejudice both the parties and the Court.

16 Efforts to resolve this disagreement have proved fruitless. Acacia contends that the Court
17 has ruled, and thus that no briefing schedule can now be set unless defendants request one by a
18 formal motion.³ Accordingly, we are doing so.

II. BACKGROUND

20 After the June 14 Case Management Conference, the parties diligently followed the
21 Court's direction to meet and confer on a suitable briefing schedule for the Motion for

²³ ¹ The following defendants have notified Comcast's counsel that they join in this motion: The DirecTV Group, Inc.; EchoStar Satellite LLC; EchoStar Technologies Corporation; EchoStar Communications Corporation; Coxcom, Inc.; Mediacom Communications, Corp.; Charter Communications, Inc.; Cable One, Inc.; Cebridge Communications; AP Net Marketing, Inc.; ICS, Inc.; Cable America Corp.; New Destiny Internet Group, LLC; Audio Communications; VS Media, Inc.; Ademria Multimedia, LLC; Adult Entertainment Broadcast Network; Cyber Trend Inc.; Lightspeedcash; Adult Revenue Services; Innovative Ideas International; Game Link Inc.; Club Jenna, Inc.; CJ, Inc.; Global AVS, Inc.; ACMP LLC; and Cybernet Ventures Inc. See Declaration of David J. Silbert ("Silbert Decl.") ¶ 10.

²⁷ ¶ 2 Silbert Decl. ¶ 6 and Ex. 4.

28 ||³ Silbert Decl. ¶ 7.

1 Reconsideration. Acacia proposed a schedule on the afternoon of June 14.⁴ Defendants held a
2 conference call to discuss Acacia's proposal on the morning of June 15, then held a call with
3 Acacia that afternoon.⁵ In that call, the parties agreed to a schedule under which they would file
4 opening briefs on July 11, opposition briefs on August 15, and post-hearing reply briefs on
5 September 23.⁶ Acacia circulated a draft stipulation incorporating this schedule on the following
6 evening, Thursday, June 16.⁷

7 On Friday and Monday, defendants exchanged emails among themselves concerning
8 revisions to certain language in Acacia's draft stipulation.⁸ A group of defendants set a
9 conference call for Tuesday to finalize the stipulation and discuss other matters relating to the
10 Motion for Reconsideration.⁹ On that Tuesday, however, the Court issued its Order Following
11 Case Management Conference.¹⁰ Acacia contends that, by this Order, "the Court has set its own
12 schedule"—one without any briefing—and that "our earlier efforts to stipulate to a schedule for
13 all briefing have now been superceded and mooted."¹¹

14 The June 21 Order sets deadlines for the parties to exchange and file Proposed Terms and
15 Claim Elements for Construction under Patent L.R. 4-1, Preliminary Claim Constructions and
16 Extrinsic Evidence under Patent L.R. 4-2, and a Joint Claim Construction Statement and
17 Prehearing Statement under Patent L.R. 4-3.¹² It is silent on the subject of claim-construction
18 briefs.¹³ The Court has made no other statement or ruling suggesting that it prefers to hear the
19 Motion for Reconsideration without any briefing.

20

21⁴ Silbert Decl. ¶ 2 and Ex. 1.

22⁵ Silbert Decl. ¶ 3.

23⁶ *Id.*

24⁷ Silbert Decl. ¶ 3 and Ex. 2.

25⁸ Silbert Decl. ¶ 4.

26⁹ *Id.*

27¹⁰ Silbert Decl. ¶ 4 and Ex. 3.

28¹¹ Silbert Decl. Ex. 4.

¹² Silbert Decl. Ex. 3.

¹³ *Id.*

1 Acacia notified defendants of its position that no briefs should be filed on July 6.¹⁴ On
2 that day, counsel for Comcast contacted Acacia’s counsel to say that defendants would shortly be
3 forwarding a revised stipulation that incorporated the dates in the Court’s June 21 Order and
4 contained revisions to certain language in Acacia’s draft.¹⁵ Comcast’s counsel also asked
5 whether Acacia would be amenable to a small modification to the agreed schedule, under which
6 the parties would file opening briefs on July 18 (instead of July 11) and opposition briefs on
7 August 18 (instead of August 15). In response, Acacia’s counsel said that, because the June 21
8 Order sets certain dates but no briefing schedule, Acacia believes that no briefs should be filed.¹⁶
9 Acacia subsequently set forth its position in a letter.¹⁷

10 The following day, defendants tried to negotiate a compromise with Acacia, without
11 success.¹⁸ In those discussions, Acacia notified counsel for Comcast that, in its view, any
12 briefing schedule would be a “change” to the dates that the Court set in the June 21 Order, and
13 thus, under that Order, no schedule can now be set without the filing of a formal motion.¹⁹

III. ARGUMENT

The Court should require the parties to file briefs. The Motion for Reconsideration raises critical issues on which the parties should have a full opportunity to be heard. Indeed, allowing newly added parties to have that opportunity was a principal reason that the Court gave for inviting the Motion. Moreover, defendants expect that the issues presented by the Motion for Reconsideration will turn largely on legal argument, not expert testimony. Indeed, Acacia has already announced that it intends to seek reconsideration of the Court’s construction of five terms, only two of which the Court previously held to be indefinite.²⁰

²³ ¹⁴ Silbert Decl. ¶¶ 5 and 6.

¹⁵ Silbert Decl. ¶ 6.

24 | 16 *Id.*

25 ||¹⁷ Silbert Decl., Ex. 4.

26 | 18 Silbert Decl. ¶ 7.

20 | 19 Id

1 The June 21 Order does not reject briefing. It does not address briefing at all, presumably
2 because the Court had already directed the parties to work out a briefing schedule among
3 themselves. Nor are the disclosures that the June 21 Order does address a substitute for briefs.
4 As the Court is aware, Patent L.R. 4-1, 4-2, and 4-3 disclosures are summaries that are meant to
5 be served in conjunction with claim-construction briefs, not full-fledged legal arguments in
6 themselves. For this reason, Patent L.R. 4-5 requires a full course of claim-construction briefing
7 in addition to Rule 4-1, 4-2, and 4-3 disclosures.

8 The briefing schedule that the parties initially agreed to made eminent sense. It provided
9 for opening briefs accompanied by declarations from any experts; a suitable time to prepare
10 opposition briefs, including time for opposing experts to prepare rebuttal declarations; and then
11 depositions of both sides' experts in advance of the September 8 and 9 hearing. It then provided
12 for post-hearing reply briefs in which the parties would present their final arguments, including
13 arguments from the testimony at the hearing.

14 Because Acacia will no longer agree to such a schedule—or to the filing of briefs at all—
15 the Court should impose a schedule. Defendants respectfully request the following schedule,
16 which still leaves Acacia ample time to prepare an opening brief, and which preserves the
17 benefits of the schedule that the parties initially agreed to:²¹

18	July 25, 2005:	Last day to file and serve opening briefs including expert declarations
19	July 29, 2005:	Last day to serve on all other parties Proposed Terms and Claim Elements for Construction pursuant to Patent L.R. 4-1 and Preliminary Claim Construction and Extrinsic Evidence pursuant to Patent L.R. 4-2
23	August 22, 2005:	Last day to file and serve opposition briefs including rebuttal expert declarations

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26
27 evidence such as expert testimony. *See* Silbert Decl. Ex. 6 (slip opinion) at 18-21.

28 ²¹ Contrary to Acacia's assertion, this proposed schedule does not change any date that the Court
set in the June 21 Order. It merely sets additional dates that the June 21 Order does not address.

August 25, 2005: Last day to file Joint Claim Construction Statement and Prehearing Statement pursuant to Patent L.R. 4-3

September 2, 2005: Last day to complete expert depositions

September 8 and 9, 2005: Hearing

September 23, 2005: Last day to file reply briefs

IV. CONCLUSION

Briefing is essential to give due consideration to the issues that the Motion for Reconsideration will raise. For the reasons stated above, defendants respectfully request that the Court enter the [Proposed] Order Setting Briefing Schedule filed herewith.

Dated: July 12, 2005

KEKER & VAN NEST, LLP

By: /s/ David J. Silbert
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